Corporation for General Trade (WKJG-TV 33) *and* International Brotherhood of Electrical Workers, Local 723, a/w International Brotherhood of Electrical Workers, AFL–CIO. Cases 25–CA–23757 and 25–CA–24038

February 8, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On September 30, 1997, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply to the General Counsel's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its proposal prior to impasse. As the judge found, the parties had not reached impasse in their negotiations in view of the fact that there had been substantial movement in negotiations immediately prior to and after the Respondent implemented its proposals, and the Respondent had not informed the Union that it believed the parties were at impasse or otherwise indicated that further bargaining would be in vain. See, e.g., *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235 (1989), enfd. 924 F.2d 1078 (D.C. Cir. 1991) (steady progress in negotiations militates against finding impasse).

We find merit, however, in the Respondent's exception to the judge's finding that the Respondent committed an additional violation of Section 8(a)(5) and (1) because the proposal that it unilaterally implemented included a provision that altered the scope of the bargaining units by merging the two historically separate units into one unit. We find that the record fails to support the judge's finding in this respect.

It is undisputed that on September 4 or 5, 1994, the Respondent sent the Union its proposal for a successor contract, which included, inter alia, a recognition clause that combined the two historically separate units into one unit. It is also undisputed, however, that the Respondent abandoned this proposed new recognition clause in its November 2, 1994 proposal. From that time forward, the Respondent proposed combining the substantive terms covering the two separate units into one contract, instead of two, with separate addenda for each unit. Since such proposal did not seek to alter, or have the effect of altering, the scope of the bargaining units, we dismiss this complaint allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Corporation for General Trade (WKJG-TV 33), Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Without bargaining to lawful impasse with respect to this conduct and the effects of this conduct, implementing changes on February 3, 1995, in the terms and conditions of employment of the employees in the involved units including, but not limited to: (i) removing one-half hourly rate premium pay for hours worked over 8 hours in a day; (ii) reducing guaranteed 5-1/3 hours premium pay to 3 hours' premium pay for employees called in to work on their days off; (iii) reducing premium pay from 2-1/2 times to 2 times rate of pay for employees called in to work on a scheduled vacation day; (iv) removing a fifth week of vacation for employees with more than 25 years of active service with Respondent; (v) reducing paid sick leave time by 10 days per year; (vi) removing guaranteed 12-hour rest period between assignments for employees and removing the half hourly rate premium pay for employees called in to work during their 12-hour rest period; (vii) permitting supervisors to perform bargaining unit work thereby reducing the amount of overtime available to bargaining unit employees; (viii) removing classification jurisdiction thereby allowing Respondent to assign employees to work in higher-paying job classification without paying to employees the higher wages associated with such job classifications; and (ix) creating a two-tier wage structure which caused employees hired after November 4, 1994, to be paid lower wages than other employees.

(b) Unreasonably delaying the furnishing of the information to the Union which it sought in its February 20, 1995 letter as that information relates to members of the involved bargaining units.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In addition to modifying the judge's recommended Order to reflect our decision, as discussed below, we shall modify the Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We have also modified the judge's recommended Order and notice to reflect his factual finding that the Respondent has furnished the requested information to the Union, which had been unlawfully withheld, so that no affirmative order to provide this information is necessary.

2. Take the following affirmative action necessary to effectuate the polices of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of all employees in the involved units and, if an understanding is reached, embody such understanding in signed contracts.

(b) On request, rescind any and all unilateral changes the Respondent has made in the terms and conditions of employment of the employees in the involved units.

(c) Within 14 days of the date of this Order, make whole the employees in the involved units, with interest, for any loss of earnings and other benefits they may have suffered by the Respondent's unlawful refusal to apply the terms and conditions of employment as set forth in the collective-bargaining agreements which expired in November 1994 until such time as Respondent bargains in good faith to impasse or enters into new collective-bargaining agreements.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Fort Wayne, Indiana facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 3, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT insist, as a condition of reaching any collective-bargaining agreement, that International Brotherhood of Electrical Workers, Local 723, a/w International Brotherhood of Electrical Workers, AFL–CIO agree to consolidate the two units it represents into one contract and implement this.

WE WILL NOT without bargaining to a lawful impasse implement changes in the terms and conditions of employment of the employees in the involved units including, but not limited to: (i) removing one-half hourly rate premium pay for hours worked over 8 hours in a day; (ii) reducing guaranteed 5-1/3 hours premium pay to 3 hours premium pay for employees called in to work on their days off; (iii) reducing premium pay from 2-1/2 times to 2 times rate of pay for employees called in to work on a scheduled vacation day; (iv) removing a fifth week of vacation for employees with more than 25 years of active service with Respondent; (v) reducing paid sick leave time by 10-days per year; (vi) removing guaranteed 12-hour rest period between assignments for employees and removing the half hourly rate premium pay for employees called in to work during their 12-hour rest period; (vii) permitting supervisors to perform bargaining unit work thereby reducing the amount of overtime available to bargaining unit employees; (viii) removing classification jurisdiction thereby allowing Respondent to assign employees to work in higher-paying job classifications without paying to employees the higher wages associated with such job classifications; and (ix) creating a two-tier wage structure which caused employees hired after November 4, 1994, to be paid lower wages than other employees.

WE WILL NOT unreasonably delay furnishing information to International Brotherhood of Electrical Workers, Local 723, a/w International Brotherhood of Electrical Workers, AFL–CIO which it sought in its February 20, 1995 letter as that information relates to members of the involved bargaining units.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with International Brotherhood of Electrical Workers, Local 723, a/w International Brotherhood of Electrical Workers, AFL–CIO as the exclusive representative of all employees in the following units and, if an understanding is reached, embody such understanding in signed contracts:

> All cameramen, projectionists, audio and video technicians, including switchers, transmitter technicians, and floorman-directors, film cutters, producer-directors, film editors, art directors, news photographers, continuity clerks, continuity coordinators, and production assistants, and excluding radio announcers operating ra-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

> dio control equipment, office and clerical employees, guards and professional employees and supervisory employees as defined in the Act.
>
> All regular full-time anchors, reporters and announcers at WKJG-TV Studios in Fort Wayne, Indiana; but excluding the general manager, the farm director, the news director, the public affairs director, all office clerical employees, all professional employees, guards and supervisors as defined in the Labor Management Relations Act, as amended, as that unit of employees is described in the certification of representative, issued May 14, 1974, at Indianapolis, Indiana, in Case 25–RM–386 of the National Labor Relations Board.

WE WILL, on request, rescind any and all unilateral changes we have made in the terms and conditions of employment of the employees in the involved units.

WE WILL make whole the employees in the involved units, with interest, for any loss they may have suffered by our unlawful refusal to apply the terms and conditions of employment as set forth in the collective-bargaining agreements which expired in November 1994 until such time as we bargain in good faith to impasse or enter into new collective-bargaining agreements.

CORPORATION FOR GENERAL TRADE (WKJG-TV 33)

Michael T. Beck, Esq., for the General Counsel.
Robert S. Sanders, III, Esq. (Daniels, Sanders, Pianowski, Todd & Thomas), of Elkhart, Indiana, for the Respondent.
Mr. Ronald Bame, of Fort Wayne, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. International Brotherhood of Electrical Workers, Local 723, a/w International Brotherhood of Electrical Workers, AFL–CIO (the Union or the Charging Party) filed charges against Corporation for General Trade (WKJG–TV 33), (Respondent) in Cases 25–CA–23757 and 25–CA–24038 on February 22 and June 19, 1995, respectively. An order consolidating cases, consolidated complaint and notice of hearing was issued December 11, 1996. It alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees. Respondent denies violating the Act.

A hearing was held on June 2–4, 1997, in Fort Wayne, Indiana. On the entire record in this proceeding, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel and by Respondent on July 28, 1997, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Fort Wayne, has been engaged in the operation of a television broadcasting station. The complaint alleges, the Respondent admits, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

On September 4 or 5, 1994, Respondent sent the Union its proposed successor contract which contained substantial changes from the prior contracts, including a recognition clause which combined two units, namely, the production and technical unit[1] and the talent unit,[2] into one unit. Respondent's Exhibit 3. The cover letter, Respondent's Exhibit 16 from Nichols to Bame indicates:

> Enclosed you will find the changes we wish to make in the Production/Technical and Talent contracts. You will see that *we have combined the two agreements*.
>
> We would like to meet as soon as possible following your review of these changes. Due to the *extensive changes*, I felt that at our first meeting we could answer questions on how he organizational structure would be implemented. [Emphasis added.]

Bame pointed out that the first page of the agreement, under the paragraph designated "THIS AGREEMENT" refers to "the bargaining unit hereinafter described, the members of said bargaining unit being hereinafter referred to as 'Employees' and further defined in Addendum A, Section A1, employed now or hereafter during the term of this Agreement, by the Employer at the said television station."

And on page 2 of the proposed agreement in the recognition clause the document refers to "the following bargaining unit" and goes on to describe one combined bargaining unit. The

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[1] The agreement, G.C. Exh. 24(a), which was then in effect (November 4, 1994) described this unit of employees as follows:

> All cameramen, projectionists, audio and video technicians, including switchers, transmitter technicians, and floorman-directors, film cutters, producer-directors, film editors, art directors, news photographers, continuity clerks, continuity coordinators, and production assistants, and excluding radio announcers operating radio control equipment, office and clerical employees, guards and professional employees and supervisory employees as defined in the Act.

The employees described in this unit have been represented by the Union and have been recognized since the mid-1960s.

[2] The separate collective-bargaining agreement which was in effect at the time (November 4, 1991, to November 3, 1994) covering this unit, G.C. Exh. 24(b), described the unit as follows:

> All regular full-time anchors, reporters and announcers at WKJG-TV Studios in Fort Wayne, Indiana; but excluding the general manager, the farm director, the news director, the public affairs director, all office clerical employees, all professional employees, guards and supervisors as defined in the Labor Management Relations Act, as amended, as that unit of employees is described in the certification of representative, issued May 14, 1974, at Indianapolis, Indiana, in Case No. 25–RM–386 of the National Labor Relations Board.

Respondent's former general manager, William Nichols testified that the employer has been recognizing the Union as the exclusive bargaining agent of these employees since the late 1960s. Originally they were in another union and these employees held an election to be represented by the Union involved herein.

proposal contained a total overhaul of job titles. William Nicholas, who at the time was Respondent's general manager, explained that there were titles in the old agreement that had gone back many years and did not exist in 1994.[3] Respondent also proposed to change job titles of a majority of the employees in the production unit to operator class in that it proposed to establish an operator pool. Respondent also proposed to use nonbargaining unit employees (or subcontract) to do work which had previously been done by bargaining unit employees, viz. the operational part (not the setups) of remote broadcasts. And Respondent proposed to have management personnel perform some of the functions previously performed by the bargaining unit at the station, such as editing. Additionally, Respondent also proposed, among other things, to eliminate a number of so-called premium pays. Nichols testified that the Company's contract proposal changed how remote broadcast work was going to be done in that before the on the air work was done by bargaining unit employees (the set up was done by nonunion people) and the Company was proposing to use nonbargaining unit employees or subcontractors; that there was no two-tier wage scale in the 1991–1994 contracts[4]; that with the proposal the Company gave to the Union in September 1994 he believed that there were going to be two separate contracts but in the Company's proposal, Respondent's Exhibit 3, the Company combined the two units into one unit in the recognition clause; and that the language in that proposal indicated that the Company was recognizing the Union as the exclusive bargaining representative of the bargaining unit (singular). Todd Gallagher, a bench technician who is a union steward and on the bargaining committee, testified that the Company's proposal was a complete rewrite with a lot of work rule changes, a lot of things missing that the employees enjoyed previously in the other contract, it was something completely new; and that the proposal combined both involved units into a single contract with two addendum and separate pay scales. Bame, who began negotiating contracts with this Company around 1985, testified that the changes which the Respondent proposed in September 1994 were overwhelming; that more of the prior contracts were subject to Respondent's proposed changes then were not; that some of the basic fundamental proposed changes included having one bargaining unit in one contract, removing work from the union's jurisdiction and giving it to outside contractors or other company people, merging most of the involved employees into a pool which would allow the Company to cross jurisdictional lines that existed in prior agreements, and doing away with premiums except those required by law such as overtime for working over 40 hours.

On September 22, 1994, Respondent and the Union held their first negotiating session. In attendance were Bame, Gallagher, and Jim Lindley for the Union,[5] and Nichols, Robert Sanders, Mark Meyer, Steve Buyze, Eric Groenwald, and Mat Kyle for the Respondent. Gallagher testified that they spent the entire session discussing the changes in the Company's proposal. Bame testified that it took the whole meeting to review Respondent's proposal because it was so lengthy and he was not sure if they were able to go over the entire proposal during this meeting.

On October 3, 1994, the second negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Burt Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Nichols testified that the Union presented its proposal to the Respondent, which was reviewed at this meeting; and that Respondent also proposed an addition to an addendum which dealt with subcontracting, General Counsel's Exhibit 4. Gallagher testified that the Union made some information requests; that the parties discussed layoff and call back language; that the Union came to bargain for two separate contracts for two separate units and that understanding never changed in negotiations; and that General Counsel's Exhibit 30 is the Union's proposal which is dated but he was not sure whether the parties got to this on October 3. Bame testified that the Union's proposal included a 6-percent-per-year wage increase.

By letter dated October 12, 1994, Respondent's Exhibit 4, the Union requested that the Respondent provide "information which is necessary for the Union to fully understand the Company's proposals." The letter goes on to indicate that "[b]ecause of the great many changes the Company is proposing, the amount of information needed is substantial."

On October 17, 1994, the third negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. A union information request was discussed. Respondent presented its wage proposals, namely, a 10-percent decrease in pay beginning November 1994 for employees currently on the staff and an even lower wage scale (two tier) for new hires after November 1994. The Union requested information on the justification for the 10-percent wage cut. Respondent refused to provide it, indicating that Respondent was not pleading poverty and Respondent was not claiming that it could not afford increases. Respondent agreed to change its proposal so that the cap on the probationary period would be one calendar year, the word transfer would be deleted from the management-rights clause, proper cause for termination would be changed to just cause, the deadline for the fourth step of arbitration would be 30 and not 7 days, to allow a substitute form for sick leave, and to include step children in funeral leave. Respondent informed the Union that the Respondent's proposal is 180 degrees opposed to most union proposals and the Company was proposing to change the existing contract in most respects. Nichols testified that Respondent was proposing to change the existing contact at a very basic level. Nichols also testified that the information requested by the Union on October 12 was

[3] Nichols testified that with the certification of the part-time photographer/reporters in the late 1970s employees ceased to be added by certification and from that point forward any change in the description of the two bargaining units was done through negotiation.

[4] He pointed out that the 1979 contracts, R. Exhs. 1 and 2, contained a two-tier wage scale and it continued in 1982, 1983, and 1984, R. Exhs. 13, 14, and 15, respectively.

[5] Bame testified that the steward who helped him negotiate previous contracts was promoted by Respondent 10 days before the first session and so he asked for volunteers. Reporter Dave Morin came to one meeting ansked if he had to be there. He left when he was told it was not necessary for him to be there. Otherwise the talent unit did not have a representative attend the negotiations. The three stewards on the bargaining committee were from the production unit.

provided at this meeting except for information which was provided on October 20. Gallagher testified that the Company did not feel that it needed to include an errors clause[6] but it offered a letter of leniency for the time of cross-training and a transition period from the old contract to what it was proposing; that the Company gave the Union the requested wage rates with its 10-percent decrease for current employees; that the Company offered a 1-year cap on the probationary period in response to the Union's concern for an hours cap which could take longer than 1 year for part-time employees; that the Company agreed to reinstate the cafeteria plan; that the company representatives indicated that most of the union proposals would not work in their new contract because the union proposals were based in the old contracts; that the Company agreed to the Union's proposal to add stepchildren to the funeral leave provision and to increase the investment options on the 401K plan from three to six; and that the Union kept its proposals on the two units separate because they were there bargaining two separate contracts. Bame testified that his notes of this meeting, General Counsel's Exhibit 47, contain the following; "not agreeable to combining both units into one with the contract as proposed by the Company—If we can agree on a single contract then we" but he was not sure if this is something he "put across the table" to the Company since he has the habit of writing what he wants to say.

On October 19, 1994, the fourth negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Respondent presented the Union with written changes to the Respondent's proposal which changes covered agreements reached at the prior meeting. Nichols' notes, General Counsel's Exhibit 6, indicate "union not agreeable to put both units under one agreement but they might change down the road." He testified that the Union indicated that it was willing to discuss the Employer's proposed changes in the operator class; and that he did not recall a point at any meeting where the Union said that it would absolutely agree to the change Respondent asked for regarding the operator class. Gallagher testified that the Union received some of the things it had requested, namely, a seniority list, health census, a list of interns, a temporary employee list, and amendments to the Company's proposal. G.C. Exh. 33. He also testified that the Union agreed to section 1.03 of the Company's proposal; that the Union might possibly accept some of the parts of the Company's proposed contract with some changes; that the Union still assumed that it was bargaining for a contract for each unit; and that the Union was not opposed to the operator pool but the conditions had to be negotiated.

On October 20, 1994, the fifth negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Respondent proposed new language on the issue of the internship program in response to the Union's request for more specific language regarding how it would work and what rules would govern it. Nichols' notes, General Counsel's Exhibit 7, indicate that Respondent indicated that it would agree to add back some of the economic issues[7] to its proposal if the Union would agree to pool operators. He testified that they discussed a number of issues that the Union brought up and the parties went through the contract term by term. The Union indicated that it would not be opposed to legitimate interns and it indicated that it would provide language regarding overtime replacement. Gallagher testified that the Company provided certain information which Bame had requested; that the Company also submitted a proposal, General Counsel's Exhibit 35; that the Company's changed language on interns was discussed; that the Company, indicating that it needed more flexibility, proposed a modified version (8 hours) of the 12-hour rule, a minimum of 5.3 hours of premium pay for working on a day off, call back travel time, double time and one half for working during vacation, grandfathering employees who had earned 5 weeks of vacation, returning the 40 accumulated sick days, and deleting the 10-percent paycut proposal for current employees (but no increase); that he believed that the flexibility the Company was looking for was the operator pool; that the Union agreed to a number of the Company's proposals, General Counsel's Exhibit 34[8]; that the Union offered to extend the present probationary period by 90 days at the Company's request; that the operator pool would allow employees to work in engineering and production jobs which was not allowed under prior contracts; and that a number of other proposals were discussed. Bame testified that the Company agreed to add something new to the contract in that it agreed to rewrite the intern language to address the concerns about this provision, which had not appeared in any of the prior contracts; that, as indicated above, a number of items were agreed to by the parties; and that all but about 6 of the approximately 40 people represented by the Union would have been subject to the Company's proposed operator pool.

On October 24, 1994, the sixth negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Respondent gave some proposals to the Union, General Counsel's Exhibit 9. The parties discussed only specific proposals of the Respondent which the Union objected to and the Union agreed to the following sections of Respondent's proposal: 1.01, 1.02, 1.03, 1.06, 1.08, and 1.09. Respondent indicated that it was willing to modify its economic issues proposal and it proposed (1) to delete its proposal regarding

[6] The clause relieves the employee of responsibility if they are performing more than one job simultaneously.

[7] Respondent's original proposal had removed (a) the "12 hour rule" which accorded the employee premium pay if he or she did not have 12 hours of rest between shifts, (b) premium pay (time and a half) for 5.3 hours if the employee worked on his or her day off, (c) pay for 1 hour of travel time if the employee was called back to work after he or she had left work, (d) premium pay for working on a day that was a vacation day, and (e) the fifth week of vacation. Respondent indicated that it was willing to put back (1) a modified version of the "12 hour rule" which called for premium pay if the employee did not have 8 hours of rest, (2) the day-off premium pay rule but the latest proposal did not apply to part-timers, (3) the 1-hour pay-for-call back, (4) premium pay for working on a vacation day, and (5) the fifth week of vacation only for those who already had it. Respondent also indicated that it was willing to discuss the age rates for current employees but it wanted to keep the 10-percent reduction for new hires.

[8] Gallagher testified that a lot of the terms were satisfactory to both parties and they just need dates; that the Union agreed to sec. 1.02 Change of Termination Procedure, 1.03 No Strike or Lockout, 1.04 Trade Jurisdiction, 1.06 Employer and Union Conferences, and 2.03 Inspection.

outside contractors, (2) add language covering remote broadcasts, and (3) provide some production language on layoff and termination. Nichols' notes, General Counsel's Exhibit 8, indicate "union agrees to combining units." Gallagher testified that they received Company proposed contract changes; that Bame gave the Company the Union's proposal on internship; that they asked the Company what it had to have and what was negotiable and the Company indicated that it had to have assignments, the operations pool, interns, management, and subcontracting to do the units members' work; and that the Company agreed to drop 1.10(B) subcontracting with an indication that it was going to write something about subcontracting into the remote broadcast language. Bame testified that the parties were making some movement but the magnitude of the changes that the Company was proposing was enormous and they were getting closer to the expiration of the contract so he asked the Company to indicate what their essential items were.

On October 27, 1994, the seventh negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. A written proposal regarding the deletion of section 1.10(B), as agreed to in the prior meeting, of Respondent's proposal was given to the Union. Respondent also agreed to change the recall rights under its layoff provision from 12 to 18 months which was the period given in the 1991–1993 contract. It agreed to pay overtime after 8 hours, to address the issue of holiday pay so that it would not be as restrictive (in terms of premium pay) as it was under the Company's original proposal, to revise the proposal for discharge for cause, change its proposal on the accumulation of sick leave from 40 to 50 days retaining the 10 day total a year, to reinstate the successorship clause, to reinstate the vacancies language, and to reinstate rest periods. Nichols testified that it was probable that due to the sheer number of changes that the company was proposing it necessitated spending the majority of the time on Company proposals. Gallagher testified that the above-described Company proposals were received; that the parties discussed a specified part-timer being covered by the contract and the Company indicated that he was being hired as a full-time reporter and would be in the bargaining unit; that the definition of workday and workweek were discussed; that the Company agreed to reconsider its full-time to part-time reduction proposal; that the parties discussed 18 vis-a-vis 12 months recall rights; that the parties discussed how 10-hour workdays would affect premium pay, pyramiding, and cascading pay, the Company's new proposal to deny holiday pay to anyone sick the day before or after a holiday, time allowances for travel, the fifth week of vacation, and the increased reasons for discharge and their exclusion from the grievance procedure; that the Company changed its position and agreed to the 18 months recall right and overtime for work over 8 hours[9]; that the Company indicated that if it got the operator pool it would look to eliminate the qualifiers for holiday pay[10]; that the Company dropped the 2-week maximum allowed of vacation to take at sign up; that the Company changed its position on accumulated sick leave to allow a total accumulation of up to 50 days and it returned the 18-month sick leave; and that the Company agreed to put back the successorship clause, rest periods, and the vacancies clause.

On October 31, 1994, the eighth negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Respondent presented new proposals dealing with workday, workweek, subcontracting, and section 1.10 of talent. Respondent's written proposed changes were received as General Counsel' Exhibit 13. They deal with the workday, the workweek, and discharge for cause. Respondent agreed to use unit personnel on remote broadcasts as long as they were working on straight time and not overtime at the time of the broadcast. Nichols testified that Respondent also agreed to reinstate 2 weeks' pay at the time of discharge. Subsequently he testified that his notes, General Counsel's Exhibit 13, reflect that the Company did not agree to reinstate the 2 weeks. The Union agreed to a 10-hour workday as proposed by the Company provided the benefits were also based on a 10 workday. Respondent changed the block out provision (precluding vacations during that period) for production employees so that it covered a 6-week period instead of an 8-week period during the period from May through October. The parties agreed to extend the collective-bargaining agreements that were due to expire on November 3 on a day-by-day basis until one party gave the other 7 days notice for terminating those agreements. Gallagher testified that at this meeting the Company made new proposals regarding workday and workweek and discharge for cause, General Counsel's Exhibit 13; that the Company indicated that unless the IBEW members were willing to work remote on straight time alone it wanted to subcontract; and that the Company changed its position on vacation blockouts.

On November 2, 1994, the ninth negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Respondent gave the Union a new proposed contract containing the changes that had already been discussed. The Company agreed to do away with the 20-percent reduction in pay for nonexperienced personnel if the Union would agree to the two tier wage system. The parties agreed on section 1.10(A). The Union offered new language on section 1.10(B) which dealt with interns. The parties agreed on sections 2.02(A) and 2.02(B). Respondent agreed to keep pay rates at the present level for existing employees, to change the "12 hour rule" so that it is an 8-hour rule, paying overtime for over 8- and 10-hour shifts, pay part-timers for over 10-hour shifts, reinstate 5.3 hours of overtime for employees called in on their day off, reinstate the call back and call prior language, reinstate the 2-1/2-time premium pay for vacation time, and giving the employees who already earned it a fifth week of vacation.[11] Nichols testified that Respondent's Exhibit 5 is the revised Company proposal which was offered to the Union as of November 2, 1994, and Respondent's Exhibit 6 is the status sheet which the Company gave to the Union at this meeting, which sheet lists the economic issues that the Company was willing to put back in the contract to get an overall agreement. Nichols also testified that his notes, General Counsel's Exhibit 14, reflect

[9] This was a change in that the Company originally proposed overtime for work over 40 hours.

[10] Gallagher testified that the Union was agreeable to the operator pool all along and it was just a matter of working out the conditions.

[11] Nichols testified that all of these agreements were made conditional on reaching a comprehensive agreement. He could not locate this condition in his notes.

that Bame agreed to combining some of the common provisions of the two contracts into one master contract with two addenda. Subsequently Nichols testified that his notes of this session indicate that the Union said that it was not opposed to the addendum. Meyers testified that he authored most of the November 2, 1994, Company proposal, Respondent's Exhibit 5, and it was the intent of the Company to have two separate contracts and the way that was carried out was by combining the unit description and identifying the Union as the sole collective-bargaining agent for the following bargaining unit (singular) followed by the single unit description.[12] Gallagher testified that the Company presented a copy of their original proposal with strikeouts and additions and a list of items that the company wanted to modify, add or change; that the Company was still combining in the main body with two addendum; that the Union was still negotiating two separate contracts; that a lot of economic terms ended up on the Company's status sheet notwithstanding the fact that he thought that the parties had agreed on them in prior meetings; and that at this point in the negotiations the Union's proposal had only been discussed once because so much was going on with the Company's proposal and the Company had indicated that a lot of what the Union proposed would not work with the Company's new proposal. Buyze testified that when he was submitting copies of his bargaining notes to the Board he found some undated notes between his October 1994 notes and his November 1994 notes; that in comparing them to notes of other people who were involved in the bargaining he determined that they were notes of the November 2, 1994 session; that he has other notes for November 2, 1994, which most likely are for earlier in the day before they started going through the agreement from top to bottom; that in the top right hand corner of the first page of Respondent's Exhibit 19 he wrote "not Disagreeable to titles or single contract"[13]; and that it *probably* was a comment made by Bame. On cross-examination Buyze testified that his above-described notes are undated; that he did not list who was at the meeting; that he did not indicate on the notes who made this comment; that he was *sure* that Bame said this; and that while he did not remember 100 percent what everybody said in every meeting, in this specific case he did remember that is what Bame said.

On November 18, 1994, the 10th negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. The Union, with respect to a sticking point in the negotiations, indicated that it was not 100 percent against the Company proposal on remote broadcasting but it wanted to discuss how far away from the station the company was proposing the Union to give up that work. The Company never made a proposal to the Union in terms of distance, other than all work occurring off premises. For the second time the parties discussed the Union's proposals. Regarding the Union proposals, the Company agreed to provide the Union with schedules in advance so that the Union could review them and make suggestions to the Company. The Company changed its original position and agreed to remove the allowance of a waiver of rest periods between assignments if the Union would agree to the Company's modified 8-hour rule. For the first time the parties discussed specifically with a listing what management personnel would be allowed to do bargaining unit work. Nichols testified that his notes, General Counsel's Exhibit 15, indicate that Bame said that he did not care if they had one contract or two. Gallagher testified that the parties reviewed the Union's October 3, 1994 proposal, General Counsel's Exhibit 30, at this meeting; that with respect to the Union's proposal, the Company had already agreed to the vacancies provision; that the parties agreed on the terms of the rest between assignments section but it was not what the Union had proposed; that the Company agreed to add the grievance settlement based on a part-timer day off; that the Company agreed to add stepchildren to funeral leave; that the Company had agreed to increase investment options from three to six; that the Company agreed to put dental insurance back in the agreement; that the Company agreed to put the same things the parties had agreed to on the production/engineering agreement regarding vacation, the funeral leave adding stepchildren and the insurance, in the talent contract; and that they were discussing the two units separately because they were negotiating two separate contracts.

On November 23, 1994, the eleventh negotiating session was held. In attendance were Bame, Gallagher, and Lindley for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. The Company made new written proposals to the Union regarding insurance, vacation overtime premium, and trade jurisdiction. (G.C. Exh. 17.) The trade jurisdiction dealt with a change in Respondent's proposal on remote broadcasting in that it now named the actual management personnel who would do the remote work. The Company agreed to delete that portion of the 401K plan that said that at least 50 percent of the employees had to participate. Respondent changed its proposal in section 3.07(B) from two times to 2-1/2 times. The Company indicated that it was willing to discuss changes. Nichols testified that up to this point in the negotiations no one at the bargaining table made any suggestion that the parties were at impasse. Gallagher testified that the Company presented a new written proposal and Bame received some medical information; that the Company agreed that there was a problem with its vacation overtime premium and it agreed to rewrite it; that the Company agreed that it had already agreed to drop the required 50-percent participation in the 401K plan; and that the Company suggested that at the next meeting there should be a list of the problem areas; and that no one at this meeting suggested that the parties were at impasse and the word impasse was not used. Bame sponsored General Counsel's Exhibit 56 which is the Company's November 23, 1994 proposal regarding vacation overtime premium.

On November 29, 1994, the 12th negotiating session was held. In attendance were Bame, Gallagher, Lindley, and Gonzales for the Union, and Sanders, Meyer, and Buyze for the Respondent. Nichols did not attend this meeting. Meyer testified that the Union presented the Company with a proposal regarding the internship which indicated that the interns should not be scheduled beyond 8 hours, their work could not replace overtime assignments, and they would have to work side by side with an employee at all times; that this proposal by the Union regarding interns had not been presented before; that as indi-

[12] The single unit description reads as follows:

> All technicians, Director/Editors, Operators, Continuity Employees, regular Full-Time Television Announcers, Anchors, and Reporters, and excluding office and clerical employees, guards, professional employees and supervisory employees as defined in the Labor Management Relations Act as amended.

[13] Unlike all of the other writing on this page this note is written at a 45-degree angle to the lines on the page.

cated on page two of his notes, General Counsel's Exhibit 25, the Union agreed to cascading pay language as it stands; that page three of his notes makes it clear that Bame made it clear that in the Union's opinion the parties were talking about two separate bargaining units; that the proposal submitted to the Union in December 1994 was a single contract with two addenda; that the contract which was implemented in February 1995 is one contract with two separate addenda each of which identifies an individual bargaining unit; and that he has no notes of anyone saying at this meeting "I think we are at impasse." Meyers also testified that at this meeting the Company offered to have two separate contracts with two separate addenda but the Union declined that offer; that he did not know what, according to his notes, Bame was talking about when he said "2 separate barg. Units"; that Bame said fine lets have one contract for these two separate bargaining units; and that there is nothing in his notes to indicate that Bame said this. Gallagher testified that his bargaining committee did list areas which were still open for negotiation but it was not put in written form to hand to the Company across the table; that the Company presented a rewrite of the vacation overtime premium; that the parties went through the contract listing areas where there was still concern; that after a caucus the Company addressed several of the concerns; that the union was under the impression that it was negotiating two contracts but at times it seemed that the Company was putting the units together in a single contract, it expressed concern about this and the Company said they were "doing" two separate contracts with two separate recognitions[14]; that the Union's bargaining committee intended to agree on a format of a main body and an addendum and the pay scale but they were assuming that meant a main body and addendum for pay scale for each unit; that the Company took the cap off the number of stewards allowed; that the Company agreed to language where it would give the Union steward a copy of the proposed schedule 7 days prior to it being posted so that the steward could review it and make suggestions before it was posted; that the Company changed its proposal on days off in that it was going to add language allowing the four 10-hour days for that under days off; and that no one at this meeting suggested that the parties were at impasse. When asked by counsel for Respondent if his bargaining notes reflected that the Union advised the Company that it, the Union, was bargaining for two contracts and two separate units Gallagher referred to page two of his notes for this November 29, 1994 meeting, General Counsel's Exhibit 42 where, according to Gallagher's testimony, this same counsel for Respondent, Sanders, during the negotiating session said, in response to the Union bargaining committee's concern, that there would be two separate contracts with separate recognitions. Bame testified that there has never been an impasse declared; and that he was not going to be available in December and offered to have an international representative sit in for him but the Company indicated that it was not interested. On cross-examination Bame testified that he may have asked during this negotiating session whether the Company intended that there be one or two units; and that he never agreed to combining the contracts nor had he ever agreed to combining the units at any point in time, "I may have implied that we would consider it under certain conditions, but I never agreed to do it." On redirect Bame testified that he may have said that the Union was not opposed to the idea of addenda but he was not agreeing to the form of the contract that the Respondent ultimately implemented; and that what he meant when he said he might not be disagreeable to the idea of addenda was if the addendum was attached to a contract that only pertained to that bargaining unit. Buyze testified that

> Bame . . . asked if we were dealing with one or two contracts because both Addendum were labeled Addendum A and there was some confusion. That entered into some conversation about what our purpose and intent was. It was communicated that we weren't concerned about one contract or two contracts. Coming out of that discussion, the company proposed that we would make it one contract, label them Addendum A and label them Addendum B, and that is what we did.

When asked on cross-examination "you testified that the union agreed to Addendum A and Addendum B," Buzye testified

> No. That's not quite what I said. What I said, coming out of a discussion the company had *the feeling* that was what the union wanted. We proposed splitting into Addenda A's and Addenda B's and I don't remember any further discussions on it for *many, many* bargaining sessions. From that point on, we submitted them as Addendum A and Addendum B and I do not remember any objection being raised by the union. [Emphasis added.]

Buyze also testified that there were at least two other bargaining sessions before the Company implemented its final offer. There was only one.

The Company submitted another contract proposal to the Union on December 6, 1994, containing all of the changes which had been discussed.[15] Nichols testified that the Company, during the first week of December 1994, sent the Union a letter indicating that the Company intended to implement the contract on January 13, 1995. By letter dated December 9, 1994, from Sanders to Bame, Respondent's Exhibit 7, the Union was informed in writing that the Company had requested the imposition of a deadline with respect to negotiations[16]; and that the Company would delay the implementation of the Company's final offer and revised proposals until January 13, 1995. Nicholas testified that with three of the last five contracts the Company has reached impasse and implemented its final proposal. He sponsored Respondent's Exhibit 10, a letter from Sanders to Bame in 1992 regarding negotiations on the 1991–1994 contract, indicating, among other things:

> [w]e are at an obvious and continuing impasse with respect to the single remaining issue, and unless the Union is prepared to accept the Company's proposal, or to independently propose some substantive change in its position, there can be no further value in meeting to discuss the issue.

Nichols testified that while in 1992 when the Company believed that the parties were at impasse the Company put this in writing to the Union, in 1994 when the Company believed the

[14] Gallagher testified that what the Company implemented was not what he understood to be meant by two separate contracts.

[15] The cover letter was received as G.C. Exh. 57.

[16] The letter begins with "[t]his will confirm out telephone conversation today in which I indicated that the Company as requested the imposition of a deadline . . . ." Bame testified that during his December 9, 1994 telephone conversation with Sanders the latter did not mention impasse, implementation, or deadline.

parties were at impasse, it never bothered to tell the Union that it, the Company, thought the parties were at impasse.

By letter dated December 20, 1994, General Counsel's Exhibit 58, Bame indicated the following to Sanders:

> My vacation time is no surprise development. I informed you early in November that I had vacation that I had to get in before the end of the year. I had offered to have an International Representative of the IBEW step in and continue bargaining in my absence. You declined the offer.
>
> The Union is not agreeable to any form of implementation of the "company's final offer." For the Company to do so implies that you have declared an impasse which you have not done. Your offer includes putting two separate bargaining units into one contract which the Union has not agreed to. It also drastically changes the jurisdiction of the bargaining units which the Union has not agreed to. Your offer also removes future rights of bargaining to which the Union is not agreeable to waiving. Where we may have had extensive bargaining as you describe, it is not lengthy when measured against the large number of changes the Company is demanding.
>
> The Union is not agreeable to any deadlines that allow for implementation of the Company's last offer. We intend to continue negotiations for whatever amount of time is necessary to deal with the unresolved issues still on the table.

On January 9, 1995, the 13th negotiating session was held. In attendance were Bame, Alan Goddard, Gallagher, Lindley, and Gonzales for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. When asked if anyone at this meeting said that the parties were at impasse Nichols answered, "I don't see it in my notes." He also did not see anything in his notes indicating that the Company made any new proposals at this meeting. When the Union pointed out that part-time photographer/reporters were under the union jurisdiction Respondent indicated that it would be folded into the proposed agreement. While a notation appears in Nichols' notes, General Counsel's Exhibit 19, regarding the Company agreeing to add language under the remote production clause that no bargaining unit employee would be laid off or terminated as a direct result of such work, Nichols testified that he believed that this was agreed on earlier. The notes contain the following: "[RB] COMPANY IS STILL TRYING TO ALTER THE BARGAINING UNIT AS CERTIFIED. UNION DOESN'T ACCEPT OUR MODIFICATION OF ADDEND A." The Company proposed for the first time having production and technical employees sign the payola notice which indicates that an employee could be terminated if they violated the payola provision. This change had not been discussed at any meeting prior to this meeting. Nichols testified that this was not, in his opinion, a bargainable issue since the Federal Communications Commission required it. The Company agreed to give the Union a new written contract proposal after this January 9 meeting containing the changes that were made in this meeting. The Company also agreed to extend the implementation date to February 3, 1995. The parties agreed to meet on February 10, 1995. The Company made it known to the Union that it wanted to continue to meet in January to discuss its contract proposal even though it was implementing it on February 3, 1995. Nichols testified that Respondent's Exhibit 8, which is a statue sheet dated December 6, 1994,[17] was sent to the Union before this meeting along with a revised proposal dated "12–6–94," Respondent's Exhibit 9. Nichols testified that while there was a lot of discussion about the economic items on the status sheet these items were never incorporated into the actual revised proposals which were given to the Union. He also testified that the "12–6–94" revised proposal was the first time there was an addendum A for technicians and directors and an addendum B for announcers and talent because the Company believed that the Union was agreeable to having one boilerplate with two addendum and the Company clarified the addendum. Meyers testified that his notes, General Counsel's Exhibit 26, reflect that the Company provided the recognition clause change requested by the Union on that day; and that he has no notes of anyone saying at this meeting "I think we are at impasse." Meyers also testified that the two changes made by the Company involved the adding of part-time reporter/photographers to the recognition clause and to offer no layoff language in its remote broadcast clause. Gallagher testified that for the first time the subject of payola/plugola was brought up at a negotiating session; that he had never been asked to sign one of these forms before; that with respect to the December 6 Company proposal the Union had concerns about the recognition clause because it believed that part-timers and reporters were being written out of it; that the Company agreed to match the certification clause from the 1978 certification; that with respect to the remote broadcast clause the Company indicated that it would add no layoff or termination language; that remote broadcasting was a major sticking point in negotiations; that the Company changed its position with respect to when it was going to implement its offer from January 13 to February 3, 1995; that he did not recall anyone from the Company say at this meeting that the parties were at impasse and he does not have this in his notes; and that the parties agreed to meet on February 10, 1995. On cross-examination Gallagher testified that his notes for this meeting, General Counsel's Exhibit 43, indicate that the Union was not satisfied with the remote broadcasting issue at this point in time and the Company indicated that it had "gone as far as they can go with remote broadcast language"; that his same notes apparently show that the Union bargaining committee accused the Company bargaining committee of "pushing for impasse"[18]: and that at the end of this session there were many items open but the Union understood the Company's stance on remote broadcasts. And or redirect Gallagher testified that the Union never agreed to the form of the contract that was implemented but rather understood that there would be two separate contracts with two separate bargaining units; that the Union never agreed on the unit description being combined with the unit description

[17] The introductory paragraph on this status sheet and the November 2, 1994 status sheet reads: "[I]n addition to the written proposals, the Company has discussed the following provisions in connection with a comprehensive agreement on all principals": Meyers testified that this status sheet and that of November 2, 1994, were separate from the Company proposals that it had provided because they were items aside that would only become a part of the proposal in the event that an overall agreement was met; and that these economic items were not part of the proposal which was implemented.

[18] This portion of the notes reads:

- Company wanted to implement contract by January 13th 1995.
- Union still wishes to negotiate!
- Company pushing for impasse.

for the other unit in one single recognition paragraph in the contract; that while at one point the Company indicated that it can go no further with the remote broadcast language that is exactly what it did 7 days after implementing its final offer; and that he neither recalled if the Company responded to the Union's expression of its opinion that the Company was pushing for impasse nor did he recall anyone from the Company saying we are at impasse or words to that effect. And on further redirect Gallagher testified that the last thing the parties did during this last meeting before the Company's offer was implemented was to try to agree on dates to meet before the offer was implemented and the Company was agreeable to continuing these meetings prior to the implementation date. Bame testified that he was demanding that the Company bargain on payola before having anybody sign anything but the Company did not feel that it had to. On redirect Bame testified that at the conclusion of this meeting the Union was satisfied with the description of the unit such that the employer would add part-timers to that unit but the Union never agreed that that certification description would be included in a single recognition paragraph with the description of the other unit. And on recross Bame testified that he did not remember ever saying that there could be a contract of one main body with separate addendum for each unit and that would have been contrary to the Union's position through this period of time.

By letter dated January 12, 1995, General Counsel's Exhibit 60, Sanders advised Bame, as here pertinent, that Respondent enclosed new versions of the updated contract proposal of the Company; that he hoped that the Union would be able to negotiate on one of the 9 days given by the Company before implementation (including February 3, 1995) but regardless, the Company intended to implement its final offer on February 3, 1995.

By letter dated January 23, 1995, General Counsel's Exhibit 62, Bame advised Sanders as follows:

> The Union believes that no impasse exists between the parties. At no time has the Union agreed to the implementation of the Company's last offer.
>
> If the Company makes any changes in the current agreement without the concurrence of the Union, Local 723 will file an unfair labor charge with the National Labor Relations Board.

On February 3, 1995, Respondent implemented its contract proposal. General Counsel's Exhibit 20 (a), (b), and (c). Respondent reduced the 5.3 hours for employees called in to work on their day off to 3 hours in the implemented proposal. Also in the implemented proposal it reduced the premium pay for people called in to work on a scheduled vacation day from 2-1/2 times their regular rate of pay to two times their regular rate of pay, it removed all the fifth week of vacation for all employees including those who had already earned it, it reduced the number of sick days by 10 days a year, it removed the so-called 12-hour rule guaranteeing people a 12-hour rest period in between assignments, it included language permitting supervisors to perform bargaining unit work, it implemented its operator pool proposal whereby employees could be interchanged in assignments in a way not previously allowed, and it implemented a two-tier wage structure so that new hires would be paid at a lower rate. Nichols testified that the Union never agreed to any of these changes. Nichols also testified that at the time the Company implemented its offer it had no intent of changing its proposal but it did just that with respect to the remote broadcast language on February 10, 1995. Gallagher testified that since February 3, 1995, the employees have not received (a) their one and a half premium rate for hours worked over 8 hours in one day, (b) the 5.3 hours of premium pay on days that they are called on to work in their day off, (c) their 2-1/2 time for days called in on scheduled vacation days, and (d) their fifth week of vacation even if they already earned it; that since February 3, 1995, the employees' number of sick days have been reduced by 10, employees have received premium pay only under the new terms of the rest period provision, supervisors have been doing bargaining unit work that they previously were not allowed to do, the Company had implemented the operator pool, and a two-tier wage system whereby new employees are paid less than regular employees has been implemented; and that the Union did not agree to any of these changes.

On February 10, 1995, the 14th negotiating session was held. In attendance were Bame, Goddard, Gallagher, and Lindley for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Also in attendance was a mediator, Ted Keefer, from the Federal Mediation and Conciliation Service. Respondent proposed the elimination of the paragraph on remotes and the reinstatement of the old paragraph. G.C. Exh. 22. Nichols conceded that 1 week after the Company implemented its offer and said that no agreement was possible it made a significant change in the remote bargaining language which was one of the major sticking points in the negotiations. Meyer testified that the Company proposed a change in the remote broadcasting language which the Union had indicated was a major sticking point in the negotiations and which had been discussed extensively at a lot of the meetings; that this was a concession on the part of the Company in an attempt to find some resolution to the contract problem; that this was the first time the Company became aware that a change in its remote broadcast language might lead to the Union accepting the contract; and that prior to implementation, the Company's offers on remote broadcasts were simply to tinker with the language that was contained in the company proposal and a week after the implementation, the Company's proposal was to fundamentally change what it had been offering on remote broadcasts at the suggestion of the mediator. Gallagher testified that the Company changed their remote broadcast rule after both sides spoke with the mediator; and that the Union believed that items which had been agreed to across the table on October 27, 1994, were not included in the company's offer which was implemented but instead were placed in the November 2, and December 6, 1994 status sheets and it so advised the Company. On cross-examination Gallagher testified that during this session Goddard, who was from the Union's International office, said, according to Gallagher's notes,[19] that the "COMPANY WILL HAVE TO REMOVE REMOTE LANGUAGE BEFORE WE CAN MOVE ON!" Bame testified that while the Company might have said that it could go no further on the remote broadcast issue, during the very next meeting it went further; and that he was sure that the Union told the Company before February 10, 1995, that the Company's position on remote broadcasting was a major stumbling block to the agreement.

On February 20, 1995, the 15th negotiating session was held. In attendance were Bame, Goddard, Gallagher, and Lindley for

[19] G.C. Exh. 44.

the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Keefer was also present.

By letter dated February 20, 1995, General Counsel's Exhibit 63, Bame made the following request of Nichols:

> In order to properly represent the bargaining unit employees, we request that you furnish us the following:
>
> 1. A copy of the company's Affirmative Action Plan or Plans.
> 2. A copy of any discrimination complaint filed against the company during that last five years.
> 3. A list of all employees during that last five years showing for each the following: race, sex, ethnic origin and age.
>
> Please reply within one week.

Bame testified that he had never requested this information before from the Company; and that he wanted the information to determine whether there was a potential discrimination on the basis of pay with respect to employees.[20]

On February 27, 1995, the 16th negotiating session was held. In attendance were Bame, Goddard, Gallagher, and Lindley for the Union, and Nichols, Sanders, Meyer, and Buyze for the Respondent. Keefer was also present. Nichols testified that there were six or seven subsequent meetings over the period of a year and he did not recall that any items were agreed on during any of those meetings. At the time of the hearing herein the terms of the implemented agreement were still in place at the facility. Nichols also testified that no one from the talent unit ever participated in the negotiations for the contract which was to commence in 1994. When he testified herein Gallagher testified that the parties continued to meet and they have finalized the grievance and arbitration procedures.[21]

By letter dated March 1, 1995, General Counsel's Exhibit 64, Sanders denied Bame's above-described February 20, 1995, information request, indicating that Bane's request has no relation to any pending subject of negotiations, and is not even limited to bargaining unit employees. Sanders went on to indicate "unless you can demonstrate why the requested information is relevant to negotiating issues, it will not be provided."

Bame testified that Respondent provided certain of the information requested in his above-described February 20, 1995 letter at the end of January 1997.[22] Meyer testified that this information, Respondent's Exhibit 20, was provided in a bargaining session which he attended in January 1997.

[20] In his March 9, 1995 letter, R. Exh. 17, to Nichols, Bame indicated "[t]his information may not be related to any pending subject of negotiations; however, it is necessary for us to have this information to properly represent the bargaining unit employees." In his March 22, 1995 letter, R. Exh. 18, Sanders advised Bame that "the requested information has no relevancy to any of the negotiated issues with the Union, and with respect to employees who are not even members of the . . . unit, there are confidentiality and privacy issues which preclude our complying with your request for information."

[21] To the extent that Bame's testimony duplicates the unchallenged testimony that Gallagher had already given about what occurred at the various bargaining sessions it is not summarized above.

[22] He explained that Respondent only complied with the request as far as it dealt with bargaining unit employees; and that the Union's duties to the employees in the involved units extend beyond negotiating the collective-bargaining agreements to the Federal and state laws.

Analysis

In my opinion, Respondent violated the Act aa alleged in the complaint.

Paragraph 6(a) of the complaint alleges that between September 22, 1994, and February 3, 1995, Respondent insisted, as a condition of reaching any collective-bargaining agreement, that they agree to consolidate the two involved units into one contract. Paragraph 6(b) of the complaint alleges that the condition described above in paragraph 6(a) is not a mandatory subject for the purposes of collective bargaining. And paragraph 6(c) alleges that about February 3, 1995, in support of the condition described above in paragraph 6(a), Respondent declared impasse and implemented its proposal, including the condition described above in paragraph 6(a), as described below in paragraphs 7(a) through 7(c). As pointed out in *Antelope Valley Press*, 311 NLRB 459, 464 (1993), in *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958), the Supreme Court held that insistence to impasse is available to a party only with respect to a mandatory subject of bargaining. Insistence to impasse on a permissive subject of bargaining violates the statutory duty to bargain in good faith. The scope of a unit does not involve wages, hours, or other terms and conditions of employment, and therefore is a permissive subject. Thus neither party may bargain to impasse over a change in the scope of the bargaining unit. As pointed out by the General Counsel on brief, by combining the two units into a single recognition clause, Respondent altered the scope of the involved units. It then made this a part of its final offer and implemented it on February 3, 1995. When it did this Respondent failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act. As pointed out in *PRC Recording Co*., 280 NLRB 615, 634 (1986), good-faith bargaining is a prerequisite to reaching bona fide impasse. Respondent violated the Act as alleged in paragraph 6 of the complaint.

Paragraph 7(a) of the complaint alleges that about February 3, 1995, Respondent implemented changes in the terms and conditions of employment of the employees in the involved units including, but not limited to: (i) removing one-half hourly rate premium pay for hours worked over 8 hours in a day; (ii) reducing guaranteed 5-1/3 hours premium pay to 3 hours' premium pay for employees called in to work on their days off; (iii) reducing premium pay from 2-1/2 times to 2 times rate of pay for employees called in to work on a scheduled vacation day; (iv) removing a fifth week of vacation for employees with more than 25 years of active service with Respondent; (v) reducing paid sick leave time by 10 days per year; (vi) removing guaranteed 12-hour rest period between assignments for employees and removing the half hourly rate premium pay for employees called in to work during their 12-hour rest period; (vii) permitting supervisors to perform bargaining unit work thereby reducing the amount of overtime available to bargaining unit employees; (viii) removing classification jurisdiction thereby allowing Respondent to assign employees to work in higher-paying job classifications without paying to employees the higher wages associated with such job classifications; and (ix) creating a two-tier wage structure which caused employees hired after November 4, 1994, to be paid lower wages than other employees. Paragraph 7(b) alleges that the subjects set forth above in this paragraph relate to terms and conditions of employment of the involved units and are mandatory subjects for the purposes of collective bargaining. Paragraph 7(c) of the complaint alleges that Respondent engaged in the conduct described above in paragraph 7 notwithstanding the fact that Respondent and the Union had not reached a lawful impasse during negotiations. And paragraph 7(d) of the complaint alleges that Respondent engaged in the conduct described above in paragraph 7 without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct. The subjects set out in this paragraph are mandatory subjects of bargaining since they relate to terms and conditions of employment. The Union did not agree to these changes. And there was not and there could not have been a lawful impasse here. Indeed, Respondent was well aware of that fact and it did not declare an impasse but rather unlawfully implemented its final offer just after trying to arrange further negotiations before implementation. Respondent's changes were, according to its own general manager, extensive. Changes were made in the last negotiating session before February 3, 1995. Indeed a major change was made in the first session after Respondent implemented its final offer. The parties were not at an impasse on February 3, 1995. Respondent violated the Act as alleged in paragraph 7 of the complaint.

Paragraph 8 of the complaint alleges that since February 20, 1995, the Union by letter has requested that Respondent provide it with information regarding the Respondent's Affirmative Action Plan and related information, the information is necessary for and relevant to the Union's performance of its duties, and since about March 1, 1995, Respondent has failed and refused to furnish this information to the Union. The 1991–1994 agreements and the proposed agreement contain policy against discrimination clauses. The Union explained its need. Yet the Respondent waited almost 2 years before providing the information. As pointed out by the Board in *Westinghouse Electric Corp*., 239 NLRB 106 (1978), in this situation a union has a statutory and a contractual right to make a good-faith effort to correct any discrimination and the information sought is relevant. And as pointed out in *General Electric Co*., 290 NLRB 1138 (1988), the type of delay experienced here constitutes a failure and refusal to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act. Respondent violated the Act as alleged in paragraph 8 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and at all times material is the representative for purposes of collective bargaining for the employees in the units consisting of the following:

> All cameramen, projectionists, audio and video technicians, including switchers, transmitter technicians, and floorman-directors, film cutters, producer-directors, film editors, art directors, news photographers, continuity clerks, continuity coordinators, and production assistants, and excluding radio announcers operating radio control equipment, office and clerical employees, guards and professional employees and supervisory employees as defined in the Act.
>
> All regular full-time anchors, reporters and announcers at WKJG-TV Studios in Fort Wayne, Indiana; but excluding the general manager, the farm director, the news director, the public affairs director, all office clerical employees, all professional employees, guards and supervisors as defined in the Labor Management Relations Act, as amended, as that unit of employees is described in the certification of representative, issued May 14, 1974, at Indianapolis, Indiana, in Case No. 25–RM–386 of the National Labor Relations Board.

3. The Respondent violated Section 8(a)(1) and (5) of the Act by:

(a) Insisting, as a condition of reaching any collective-bargaining agreement, that the Union agree to consolidate the two units its represents into one contract and implementing this.

(b) Without a lawful impasse and without affording the Union an opportunity to bargain with Respondent with respect to this conduct and the effects of this conduct, implementing changes on February 3, 1995, in the terms and conditions of employment of the employees in the involved units including, but not limited to: (i) removing one-half hourly rate premium pay for hours worked over 8 hours in a day; (ii) reducing guaranteed 5-1/3 hours premium pay to 3 hours' premium pay for employees called in to work on their days off; (iii) reducing premium pay from 2-1/2 times to 2 times rate of pay for employees called in to work on a scheduled vacation day; (iv) removing a fifth week of vacation for employees with more than 25 years of active service with Respondent; (v) reducing paid sick leave time by 10 days per year; (vi) removing guaranteed 12-hour rest period between assignments for employees and removing the half hourly rate premium pay for employees called in to work during their 12-hour rest period; (vii) permitting supervisors to perform bargaining unit work thereby reducing the amount of overtime available to bargaining unit employees; (viii) removing classification jurisdiction thereby allowing Respondent to assign employees to work in higher-paying job classifications without paying to employees the higher wages associated with such job classifications; and (ix) creating a two-tier wage structure which caused employees hired after November 4, 1994, to be paid lower wages than other employees.

(c) Failing and refusing to furnish the information to the Union which it sought in its February 20, 1995 letter as it relates to members of the involved bargaining units.

4. The unfair aforesaid labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action set forth below to effectuate the policies of the Act.

Having found that Respondent has made unilateral changes in certain terms and conditions of employment in violation of Section 8(a)(1) and (5) of the Act, I recommend that Respondent revoke, on request, said unilateral changes. Also, I recommend that Respondent be ordered to make whole its employees for any loss they might have suffered as a result of Respondent's unlawful implementation on February 3, 1995, with interest as authorized by *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987). The recommended Order will also provide that Respondent give to the Union the information it requested in its February 20, 1995 letter as it relates to bargaining unit employees and bargain in good faith with the Union as the exclusive collective-bargaining representative of the above-described units.

[Recommended Order omitted from publication.]